CIV/APN/205/94
CIV/T/148/94

IN THE HIGH COURT OF LESOTHO

In the matters of:

I.C.I. LES (PTY) LTD	Applicant
vs	
K. T. GOOSEN	Respondent
and	
K. T. GOOSEN	Plaintiff
vs	
T.C.I. LESOTHO (PROPRIETARY) LIMITED	Defendant

JUDGMENT

Delivered by the Honourable Mr. Justice T. Monapathi on the 27th day of July, 1994

In this Application, which was moved on an urgent basis, I made the following Interim Order in favour of Mr. Hlaoli's client, on the 26th June 1994.

(a) That the Deputy Sheriff (Mr. D. Mandipaka) be joined as the 2nd Respondent.

(b) That the writ of Execution in the case number CIV/T/145/94 (the action) be stayed

pending the finalization of the application. In the meantime the Applicant/Defendant's goods removed on the strength of the writ (on the 27th June 1994) be refunded and be restored to the premises of the Applicant/Defendant.

(c) That the Applicant/Defendant shall file a bond in the sum of M2,000.00 to satisfy the security of costs including the Deputy Sheriff's fees.

(d) That the prayer for rescission of judgment shall be dealt with in the ordinary way on the return date.

(e) That the prayers (a) (b) (c) above shall operate with immediate effect.

(f) That the return date be fixed for the day of the 30th June 1994 at 9.30.

On the 30th June 1994 the matter was argued by Mr. Hlaoli for Applicant and Mr. Mare for Defendants. Judgment was to follow. I had to be satisfied that the orders had been complied with, and

that the parties would broach settlement of this complicated matters as I had encouraged them to do. The latter aspect was most unsuccessful.

I have made my remarks in one decision about fair play being the bedrock on which the rules of Court operate. I am to remark in this judgment as what havoc can be brought about by an attempt to strictly adhere to the rules of Court even where their logic would lead to absurdity. Equally important would be the timing of the steps to taken by a practitioner and not to insist on a right of way (figuratively speaking) where such insistence would result in demonstrable lack of fairness.

On the 6th April, 1994 the Plaintiff filed his summons in the action, which was not accompanied by a declaration (see Rule 21). The following were the claims contained in the summons:

1. An Order declaring the dismissal of Plaintiff by Defendant as wrongful and unlawful;

2. Payment of the sum of M27,015.00 being in respect of salaries due to the Plaintiff by Defendant but notwithstanding demand, Defendant has failed and/or neglected to pay

the aforesaid sum;

3. Interest at the rate of 18.25 per annum a *temporal morae*;

4. Costs of suit;

5. Further and/or alternative relief.

It was on the 23rd May 1994 that the Plaintiff was served with a notice of appearance to defend. Before then (On the 31st May 1994) the Defendant had been served with a Plaintiff's declaration and this was accompanied by an application for summary judgment (see Rule 28). It was on the 2nd June 1994 that the Plaintiff was served with a request for further particulars. On the 13th June 1994 the Plaintiff was served with a Notice in terms of Rule 30(1) in which the defendant herein hereby makes application to the above Honourable Court for the setting aside with costs the plaintiff's application for summary judgment. On the basis that: " it is improper proceedings in as much as the defendant has properly filed notice of appearance to defend and requested further particulars to enable it to plead." It is important to show how the rule 30(1)(i) couched. It is as follows:

"30(i) where a party to any cause has taken an irregular or improper proceeding or improper step any other party to such cause may within fourteen days of taking of such step or proceeding apply to Court to have it set aside. Provided that no party who has taken any further step in the cause with knowledge of the irregularity or impropriety shall be entitled to make such application."

It is to be noted that the summary judgment was to be heard on the 13th June 1994 at 9.30 a.m. It was only on that day at 9.15 a.m. that the said defendant's notice in terms of Rule 30(1) was served on the offices of the Plaintiff's Attorneys. Apparently the Attorney moving the application for summary could not have been aware that the service of the notice had been made.

On the 13th June 1994 the matter having been enrolled, the matter was postponed to the following Monday the 20th June, 1994 by my brother Molai J. As the Plaintiff's Attorney told this Court it was for the reason that the learned judge ordered the Plaintiff to first file security for costs (being a perigrinus) as requested by the defendant on 23rd May 1994. It should not escape notice that the plaintiff's declaration contained a paragraph 6 and prayers as follows:

Plaintiff has suffered damages in the sum of M27,015.00 being in respect of salaries due to plaintiff by defendant in lieu of notice.

Wherefore plaintiff prays for judgment against defendant for:

1. payment of the sum of M27,015.00.

2. Interest at the rate of 18.25%.

3. Costs of suit.

4. Further and/or alternative relief."

It is important to note the following things:

(a) The prayers in the declaration differed with those in the summons in that the prayer (1) in the summons had been removed. That prayer had been for a declaration.

I had not been sure that this can be done without having applied for amendment first. This I thought was more so because the

matter was clearly defended and was being opposed. But there is now no doubt that a summary judgment may be applied for in respect of claims set out in rule 28 even though the summons contained other claims (see Evelyn Haddon & Co. Ltd v Leojanko (Pty) Ltd 1967 (1) SA 662(o).

(b) Without evidence having been led it was not clear how was the sum of M27,015 has been arrived at. This is more interesting when one notes that it was in February 1994 when plaintiff's services were terminated. But such evidence is not necessarily required in terms of Rule 27(5).

May be all this can be easily explained when regard is had to the letter of appointment which was annexed to the papers. The letter contained terms and conditions which include monthly salary. But then there would probably be a dispute as to how and why plaintiff was terminated or dismissed.

But, all the same, plaintiff proceeded, and appeared before my brother Molai J when summary judgment was granted in terms of the prayers set out in the declaration to the summons. The plaintiff informed the learned judge that there was no intention to oppose the summary judgment. How correct was this? It is on

the strength of this judgment that the plaintiff proceeded to levy execution of the defendant's property which called for this applicant's response by way of this application. In terms of Rule 28(3) the only way a defendant should oppose an application for default judgment is by doing one of the following:

> (a) give security to the plaintiff to the satisfaction of the Registrar for any judgment including such costs which may be given or
>
> (b) Satisfy the Court by affidavit or with leave of the Court, by oral evidence of himself or of any other person who can swear positively to the fact that he has a *bona fide* defence.

Respondent has submitted that the application should fail on the following grounds: That the Applicant has failed to respond properly to the application for summary judgment and secondly that a summary judgment cannot be removed by way of rescission but by a judgment on appeal (invalidating the same). Let us investigate the two grounds.

Having made a broad overview of each step taken by the respective parties it opportune now to seek to arrive at a

solution to the problem by performing a balancing act. This can be introduced by asking the following questions: Having been served with a notice of intention to defend was the plaintiff entitled to file a declaration? Yes he was entitled to do so. Having been served with a notice of intention to defend was the plaintiff entitled to file an application for summary judgment? The answer should be in the affirmative. Having filed a declaration was the plaintiff entitled to file an application for summary judgment. The answer is in the negative (see Esso Standard SA (Pty) Ltd vs Virginia Oils & Chemical Co. (Pty) Ltd 1972 (2) SA 81(o)) It is because the application can be founded on a simple summons. This is similar to a situation where plaintiff elects to furnish further particulars of his claim after filing an application for summary judgment (see Jacobs vs FPJ Finans (Edms) BPK 1975 (3) SA 345 (O)). He forfeits his right to proceed on the summary judgment.

Having been served with a notice in terms of Rule 30 (1) on the 13th June was the plaintiff entitled to proceed and such to obtain judgment on the 20th June 1994? He should not have ignored the notice. It was of interest to find out as to why the defendant chose to ignore the summary judgment but proceeded to request for further particulars and then waited to file a notice in terms of Rule 30(1) on the day on which the application for default judgment was enrolled. It is also interesting to note

that the defendant's notice does not appoint a date and time on which the application would be made. This seems to be implied in the words "within fourteen days" and "apply to court." There are many interpretations to the word "apply" but the most appropriate in the circumstances would seem to be in the context of "make an application by way of a request, a motion to a court or judge (see Mobbs Ltd vs Sergeant Ltd 1936 EDL 367). But again, in this regard, one would have to compare the above interpretation with the specific way in which Rule 29(4) (on exceptions) is framed: "An exception on any grounds may be set down for hearing on a date allotted by the Registrar or notice given to both parties." Again the latter rule may imply that there would be no requirement that the Registrar shall be asked to fix a date in the notice in terms of Rule 30(1) but the party who applies shall himself appoint such a date in the notice, as in a notice of motion. In Theunissen vs Payne 1946 TPD 680, the words "application shall be made within fourteen days" in Section 7 of ordinance No4 of 1927 (T) was interpreted to mean that the application shall be set down on the roll within a period of fourteen days and not merely that notice of the application shall be given within that time. I have not thought of the distinction or significance of the use of the word "may" used in the Rule 30 (1) as against the clearly imperative "shall" used in the above ordinance in Theunissen vs Payne case (above cited). Another case which would be instructive in this regard is Vitenhage

Municipality vs Uys 1974(3) SA 800 (E).

There is another aspect to the defendant's notice in terms of Rule 30(1) to which I must advert. It is this aspect as to whether it was a good step. This is so when tested against the proviso to the said Rule 30(1). The proviso reads:

> "Provided that no party who has taken further steps in the cause with the knowledge of the irregularity or impropriety shall be entitled to make such application."

Isn't it the defendant who on the 2nd June, 1994 served the plaintiff with at request for further particulars? I would hold that the defendant disentitled itself from attaching the application for default judgment by reason of filing a request for further particulars as he has done (after service on it of the application for summary judgment). I would hold further that the defendant's attempt to impeach the application for summary judgment on the ground that a request for default judgment had been requested was a self created prejudice or predicament. I have no hesitation in deciding that the Defendant was adopting a wrong procedure or step in the circumstances.

Plaintiff ignored the application under Rule 30(1). A plaintiff's proper cause where any proceeding in a cause is

irregular is not to proceed as if there is no such process at all but to apply to Court under this rule for an order setting it aside (see Schwee vs Schwee 1909 TN 149). He was not entitled to go on and obtain a summary judgment as if nothing had happened.

I now come to the respondent's (plaintiff's) second argument. It is that one about that a summary judgment cannot be rescinded and can only be removed by way of appeal. This means according to the argument that the provisions of Rule 27(6) and Rule 45 are not applicable to judgments obtained by way of application for summary judgment. These rules concern variation and rescission of judgments. The respondent's counsel sought support for his argument from the cases of Slabbert vs Volskas Ltd 1985 (T) and Verrijdt vs Horegded Tractors and Implements (Pty) Ltd 1981 (1) SA 787 (T) and Arend and Another vs Astra Furnishers (Pty) Ltd 1973(1) 849. I am unable to accept that these cases assist the Respondent in his argument. I have not therefore been persuaded that the operation of Rule 45 (1) and 45(4) may be excluded by reason that a summary judgment can only be removed by way of an appeal.

I have to exercise my discretion in this application which is fraught with errors cross-crossing every angle and steps taken by the parties herein. I have earlier commented on the cause of

these problems. I have to make the following order by way of allowing the application and conducing to the justice of the matter.

(a) The plaintiff's summons and declaration shall be allowed to stand as if the prayer One (1) "An order declaring the dismissal of the plaintiff by defendant as wrongful and unlawful." is still existing and inserted in the summons and declaration. Plaintiff my elect to abandon the prayer.

(b) The defendant's notice of entry of appearance to defend shall be allowed to stand.

(c) The defendant's request for further particulars to plaintiff's summon is removed and set aside.

(d) The defendant's notice in terms of Rule 30(1) is removed and set aside.

(e) Plaintiff's application for summary judgment is removed and set aside. This include the

writ of execution.

(f) The defendant shall plead and if he so desires except and file any objection within seven days. In the event that the Defendant excepts he shall plead over.

(g) The Applicant/Defendant shall pay costs of the application including court's and Deputy Sheriff's fees.

(h) The Order for return of the attached and removed goods of defendant is confirmed.

T. MONAPATHI
JUDGE

27th July, 1994